IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 816 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANSUKHBHAI PARSINGBHAI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 816 of 1998
MS BANNA S DUTTA for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
MR AY KOGJE APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE M.S.SHAH

Date of decision: 25/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

#. This appeal is directed against the impugned judgment and order of conviction and sentence dated 19.8.1998 passed by the learned Additional Sessions Judge, Panchmahal at Dahod in Sessions Case No.133 of 1996 whereby the learned Judge convicted the appellant-accused for the offence under Section 302 IPC and sentenced him to suffer life imprisonment and to pay fine of Rs.1,000/= in default to further undergo one month SI. The appellant-accused has preferred this appeal through jail and learned counsel Ms.Banna Datta was appointed as advocate to defend his case in this appeal.

#. It is the prosecution case that complainant-Surpalbhai Fathabhai Mohania lodged FIR before Dahod Rural Police Station on 29.11.1995 wherein he had stated that he is serving as Chief Telephone Supervisor in Railways at Dahod. He has got three brothers; Surtanbhai is the eldest one. He is youngest to him and Gopalbhai is youngest of all. All the three brothers are staying separately with their families. They have three sisters. Sanuben got married at Galalayawad, Gendiben married at village Abhlad and youngest one Samiben got married at village Chilagota. In 1981, 36 members of Vanraj Cooperative Society purchased land survey No.947/2 admeasuring 1 acre 20 gunths for Rs.82,000/= from Varsinhbhai Dhanjibhai Katara. He is the sole member of his family in that society. His sister Gendiben married at Abhlad village with Mansukhbhai Parsingbhai Bhabhor was permitted to construct house on that land as her husband Mansukhbhai, who was serving as motor mechanic in the railways at Dahod was not having any house to stay. They constructed their house on that land in 1991 itself. Number of years had passed and both the sisters Gendiben and his brother Mansukhbhai were told to remove their house, but they were not removing. Lastly they told him that they will remove their house after the festival of "Dev Diwali". However, even thereafter they have not removed their house. Therefore, on 28.11.1995 at about 8.15 p.m. he had gone to the house of his sister Gendiben along with his son Kamlesh. At that time his sister Gendiben and Mansukhbhai were present at the house. He told his sister Gendiben to remove their house from his land. Thereupon, his sister Gendiben, her husband Mansukhbhai started abusing and told him that they are not going to remove their house. While giving abuses they had gone to the house of his brother Surtanbhai. From there

Surtanbhai came with Dhariya in his hand. His son Maheshbhai was having arrow and bow in his hands. His other son Hareshbhai was having stick and Mansukhbhai came with bow and arrow. His sister Gendiben was with them, they came running. All of them were giving filthy abuses to him telling him that they will kill him and told him to go away from that place. However, he and his son Kamlesh both did not go away from that place and they were stopping there. Therefore, they had started to pelt stones at them and Mansukhbhai shot an arrow from his bow which passed through his right side, but second arrow pierced between right side of the chest and the neck of his son-Kamlesh. He fell down then and there vomiting the blood and shouting "save, save". Because of that all the accused persons left with their weapons in their hands in the dark towards eastern direction. Immediately thereafter their neighbours Anilbhai Ramsinhbhai and Vijubhai Rasiyabhai came there. They lifted his son Kamlesh and brought him at the house of Chhatrasinh where Kamlesh was vomiting more and more blood. He became unconscious and thereafter within five minutes he died. Thereupon, his wife Shantiben, his maternal uncle and aunt Madhuben and others had come there. Leaving the dead body of Kamlesh at the house of Chhatrasinh, he had gone to the police station and lodged complaint against all the five accused persons viz. (1) Surtanbhai Fathabhai Mohania; (2) Maheshbhai Surtanbhai Mohania; (3) Gendiben; (4) Mansukhbhai and (5) Hareshbhai Surtanbhai Mohania; for the offences u/S. 302, 34, 504, 147, 148 and 149. After completing the investigation, police submitted charge sheet against all the five accused before the court of learned Magistrate against all the accused, who committed the case against the accused to the court of Sessions. The learned Judge framed the charge against all the accused at Ex.3 for the aforesaid offences. The accused did not plead guilty to the charge and claimed to be tried. Therefore, the prosecution examined as many as 15 witnesses, including the complainant-Surpalbhai Mohania PW-9 Ex.28 and his wife Shantiben PW-10 Ex.33 as eye witness.

#. In the instant case, the present appellant-accused came out with specific defence in his defence statement at Ex.7 and contended that at the time of incident, he was on his duty at Nagda and that he has been falsely involved in this case and in support of his defence he had produced document from the Railway Department along with the list Ex.55, which is there in the original record.

#. The learned Judge after considering the evidence led

by the prosecution and the defence of the accused, came to the conclusion that the prosecution failed to prove its case against all the accused except accused No.4, Mansukhbhai Parsingbhai Bhabhor for the offence for which they were charged and, therefore, by giving benefit of doubt to them the learned Judge acquitted all the other accused in this case. The learned Judge also acquitted the appellant accused for the offences u/S.147, 148, 149, 34, 504 r/w Sec.149 and 144 IPC by giving benefit of doubt, but found the appellant-accused-Mansukhbhai guilty for committing murder of deceased-Kamlesh by arrow and, therefore, committed him for the offence u/S.302 IPC and sentenced him to suffer life imprisonment and to pay fine of Rs.1,000/= in default to further undergo one month SI. This has been challenged in this appeal by the appellant-accused, which is filed from the jail.

#. Learned counsel Ms.Banna Datta for the appellant-accused submitted that in the instant case the learned Judge committed grave error in relying on the evidence of complainant-Surpal for convicting the appellant-accused for the offence u/S.302 IPC for committing murder of deceased-Kamlesh. She submitted that except interested testimony of complainant-Surpal there was no evidence of independent witness available in the case and in absence of any independent evidence, the learned Judge ought not to have relied upon the sole interested testimony of complainant-Surpal, who is closely related to the deceased-Kamlesh, who was his real son. She also submitted that from the prosecution case itself it is clear that the complainant-Surpal was animus to the accused Mansukhbhai as though they were related there was a long-standing dispute regarding the property between them. She further submitted that when the learned Judge has not thought it fit to place reliance on his evidence regarding other accused, then he ought not to have relied on his evidence for convicting the appellant-accused. She also submitted that there was not only overwriting but there were corrections also in the FIR lodged by the complainant regarding the sections under which the offences have been committed and name of father of the accused and that the FIR was lodged after a considerable period of delay and no explanation whatsoever is coming forward regarding the said gross delay of more than 20 hours. She also submitted that when the incident in question took place there was no light and in absence of light in the dark night it would not have been possible for the complainant-Surpal to see the accused Mansukhbhai using arrow from his bow, more particularly, when other accused Maheshbhai, who was also having bow and arrow with him at the time of incident.

She also submitted that in the instant case, the appellant-accused has come out with a clear case that there was no person at the time of incident and at the time of incident he was on duty at Nagda, which is at a distance from Dahod, where the incident took place and in support of his defence he had also produced Government documentary evidence from Railway Department, which could not be concocted later on. However, the learned Judge applying different yard stick against the accused, who proved his case beyond reasonable doubt, refused to consider the defence and held him guilty. She, therefore, submitted that the impugned judgment and order of conviction passed by the learned Judge be quashed and set aside and the applicant-accused be acquitted for the offence under Section 302 IPC. However, learned APP, Shri Kogje submitted that for convicting the appellant-accused, the learned Judge has not committed any error in relying upon the evidence of the complainant-Surpal. He also submitted that the learned Judge has rightly discarded the defence of alibi of the appellant-accused in support of his defence as he has not examined any witness and mere production of document would not be sufficient to hold that the accused was not present at the time of incident.

#. Before appreciating the rival submissions made by the learned counsel for the parties, we would like to deal with the material evidence of the complainant-Surpal PW-9 Ex.28. He has stated in his evidence that Anilbhai Ramsinhbhai and Vijubhai Rasiyabhai are his neighbours. He and his son Kamlesh had gone at about 7.45 p.m. towards Galalayawad, which is at the distance of about one and half to two kms. from his house. He had informed his wife that they were going to the place of incident. He and his son had first gone to Chhatrasinh on scooter and having talked with his sister-in-law Madhuben they dropped the scooter there. He admitted in his cross-examination that two accused were having torch light in their hands and there was light at the place of incident. He also admitted in his cross-examination that there is a road between the house of his sister Gendiben to the house of his brother Surtanbhai. The accused had gone to his brother and come back within 10 minutes till then he and his son were standing outside the house of his sister Gendiben. He never realized that they should have left the place. He has also admitted that he had not produced any document before the police regarding the land in question for which the dispute was going on between them. No Panchnama of his scooter was made by the police. Prior to the incident he had never told his sister Gendiben to remove her house from his land. He

never thought it fit to involve two persons to settle the dispute when his sister refused to remove her house from the land. He never released that they should have left when the accused started pelting stones. He has clearly stated that when the accused started abusing and had gone to the house of his brother and till they return back within ten minutes no one else came to the place of incident. He had admitted that he has stated in his complaint that though they were told to go away from that place he and his son Kamlesh stood there. He removed the arrow from the body of his son, but did not take with him to the police station. He threw the arrow there only, but did not tell anyone not to remove that arrow from that place. First arrow, which missed the aim, was not traceable. He has admitted that his wife Shantiben came to the house of Chhatrasinh only after his son Kamlesh died, but by mistake he has stated so in his complaint.

Shantiben, wife of Surpal was examined as PW-10 Ex.33 as if she had witnessed the incident. But the learned Judge himself refused to place reliance on her evidence in view of the evidence of her husband-Surpal. It is clear from the evidence of Surpal PW-9 that he and his son left their house at 7.45 p.m. At that time his wife Shantiben was at her house and there was a distance of about half an hour between his house and the place of incident. Therefore, it was impossible for Shantiben to witness the incident. Surpal has clearly stated in his evidence that Shantiben came to the house of Chhatrasinh only after his son died.

In the instant case, Madhuben PW-11 Ex.34 has not supported the prosecution case and turned hostile. Similarly, another witness-Manoj Chhatrasinh PW-12 Ex.37 had also not supported prosecution case.

Thus, the entire prosecution case rest on the sole testimony of the complainant-Surpal. Having carefully considered his evidence, it is clear that at the time of incident, it was dark night. He claimed that before the incident the accused started pelting stones, but no stone was found at the place of incident and in the dark night it would not be possible for him to identify any accused with the weapons in their hands. No explanation is offered for gross delay of more than 20 hours in lodging the FIR. Though the complainant had enough time to disclose names of the accused, surprisingly, the complainant committed mistake in giving wrong name of the father of the accused. Admittedly, there was overwriting in the complaint and the sections were also changed. In spite of this, the learned Judge

was not much impressed. In our considered opinion, when the learned Judge himself has not thought it fit to rely upon the evidence of the complainant-Surpal for convicting the other accused, then it was not proper for him to convict the appellant-accused for the offence u/S.302 IPC.

It is no doubt true that the complainant and accused were closely related to each other, but admittedly there was a long standing enmity between them. Enmity is double edged weapon. It would cut both the ways. In the instant case, the accused has come out with clear defence that he was not present at all at the time of incident and he was on duty at Nagda, which was at a considerable distance from Dahod. He has to probablise his evidence and not to prove it beyond doubt, like prosecution case. It is not the case of the prosecution that those documents were concocted. The documents produced along with the list at Ex.55 prima facie supports the case of the appellant-accused that on the date of incident he was on duty at Nagda, therefore, he could not be present at Dahod, where the incident took place. The fact that there was lot of overwriting and correction in the FIR, which was lodged after a considerable delay and that there is correction in the name of the father of the accused also raise serious doubt. It is difficult to place implicit reliance upon the evidence of Surpal that accused-Mansukhbhai's arrow killed the deceased when accused-Mahesh was also having arrow and bow with him at the time of incident, who was acquitted by the learned Judge. It is possible that the complainant might have involved the appellant-accused in this case only with a view to get the possession of his land for which the dispute was going on between the parties since long. The approach of the learned Judge in this case was absolutely wrong. The accused has to probablise his evidence and he is not required to prove his case beyond reasonable doubt like prosecution. It is true that in the instant case, the accused has not examined any person as a defence witness to show that he was not present at the time of incident. But we fail to understand how such evidence would be available. When the accused had pleaded the case of alibi which has been substantiated by producing authentic Government documentary evidence, which suggest that the appellant-accused was on duty at Nagda on the date of incident and not at Dahod at the place of incident, then in our considered opinion the learned Judge was wrong in presuming that the accused might have come back from Nagda to Dahod on the day of incident within two and half to three hours without any basis for it. This is nothing

but surmises and conjectures on the part of the learned Judge.

#. Under the circumstances, having carefully considered the evidence of sole testimony of complainant-Surpal, we are not prepared to place any reliance on his evidence, more particularly, when the learned Judge himself has refused to place reliance on his testimony for the other remaining four accused.

#. In view of the above discussion, we are of the clear opinion that in the instant case, prosecution has failed to prove its case against the appellant-accused also beyond reasonable doubt.

#. In view of the above discussion, this appeal is allowed and the impugned judgment and order of conviction and sentence dated 19.8.1998 passed by the learned Addl. Sessions Judge, Panchmahal at Dahod in Sessions Case No.133/96 convicting the appellant-accused-Mansukhbhai Parsingbhai Bhabhor for the offence under Section 302 IPC and sentencing him to suffer life imprisonment and to pay fine of Rs.1,000/= in default to further undergo one month SI is hereby quashed and set aside. The appellant-accused-Mansukhbhai Parsingbhai Bhabhor is ordered to be acquitted forthwith, if he is not required in any other case. Fine, if paid, be refunded to the appellant-accused.

(B.J.Shethna, J.)

(M.S.Shah, J.)

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